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FEDERAL COMMUNICATIONS COMMISSION
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May 16, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petition for Reconsideration and Clarification By NATOA, et al. in MM Docket No. 92-266

Dear Mr. Caton:

Please find enclosed, on behalf of NATOA, et al., an original and eleven copies of a Petition for Reconsideration and Clarification in the above-referenced proceeding.

Any questions regarding the submission should be referred to the undersigned.

Thank you for your attention to this matter.

Sincerely,

William E. Cook, Jr.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-266
Rate Regulation	

TO: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE CITY OF NEW YORK

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May 16, 1994

SUMMARY

NATOA, NLC, USCM, NACo and the City of New York request that the Commission reconsider or clarify certain issues raised by its March 30, 1994 cable rate orders. Specifically, the Local Governments request that the Commission: (a) clarify what are "franchise related costs" under the external cost regulations; (b) reconsider the method by which cable operators serving multiple franchise areas may advertise franchise fees and other itemized costs; (c) reconsider which costs may be considered PEG costs for purposes of subscriber bill itemization; and (d) reconsider its franchise fee refund regulations to clarify that a franchising authority may determine the method for refunding franchise fees.

Thus far, the Commission has not provided franchising authorities and cable operators sufficient guidance as to what "franchise related" costs are entitled to external cost treatment. It is critical that the Commission clarify the extent to which cable operators may treat "franchise related costs" as external costs in order to prevent unwarranted surcharges on regulated rates.

The Commission also should reconsider its regulation regarding the advertising of rates by operators serving multiple franchise areas since it would permit a cable operator to advertise rates in violation of the intent of

Section 622(c) of the Cable Act, and the Commission's own subscriber bill itemization regulation. The Commission's example in the Third Order on Reconsideration of how cable operators may advertise franchise fees on a "fee plus" basis also suggests that the Commission would permit cable operators to itemize franchise fees in a manner that would result in franchising authorities not collecting the full five percent franchise fee to which they are entitled under Section 622(b) of the 1992 Cable Act.

The Commission should reconsider its conclusion that a cable operator may itemize as "PEG-related activities" pursuant to Section 622(c)(2), 47 U.S.C. § 542(c)(2), costs required under a franchise agreement for free wiring of public buildings and similar activities. Contrary to the Commission's assertion, such activities are not related, or not necessarily related, to the provision of public, educational and governmental channels.

Finally, the Commission should reconsider its franchise fee refund regulations to clarify that a franchising authority, rather than the cable operator, has the discretion of determining whether to refund franchise fee overpayments or to deduct them against future franchise fee payments.

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Before the
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In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket No. 92-266

TO: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE CITY OF NEW YORK

Pursuant to 47 C.F.R. § 1.429, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, the National Association of Counties, and the City of New York (collectively, the "Local Governments") hereby submit this Petition in the above-captioned proceeding.

The Local Governments request that the Federal Communications Commission ("FCC" or "Commission") reconsider or clarify certain issues raised by the

Second Order on Reconsideration[1] and the Third Order on Reconsideration[2] in the above-captioned proceeding. Specifically, the Local Governments request that the Commission: (a) clarify what are "franchise related costs" under the external cost regulations; (b) reconsider the method by which cable operators serving multiple franchise areas may advertise franchise fees and other itemized costs; (c) reconsider which costs may be considered PEG costs for purposes of subscriber bill itemization; and (d) reconsider its franchise fee refund regulations to clarify that a franchising authority, rather than the cable operator, may determine the method for refunding franchise fees.

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[1] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration (MM Docket No. 92-266), FCC 94-38 (released March 30, 1994) ("Second Order on Reconsideration").

[2] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration (MM Docket No. 92-266), FCC 94-40 (released March 30, 1994) ("Third Order on Reconsideration").

DISCUSSION

I. The Commission Should Clarify What Are "Franchise Related Costs" Under Its External Costs Regulations and Forms

The Commission should clarify what are "franchise related costs" for purposes of calculating external cost increases under its external cost regulations. 47 C.F.R. § 76.922(d)(2) (1993). Thus far, the Commission has not provided franchising authorities and cable operators sufficient guidance as to what "franchise related" costs are entitled to external cost treatment. The Commission had indicated that it would release "[f]orms prescribing the precise methodology for calculating and allocating external costs and applying the price cap regime on a going forward basis."[3] However, the rate forms the FCC released pursuant to the Second Order on Reconsideration do not provide guidance as to what costs may be included as "franchise related" costs in calculating increases in external costs. See Lines B4, B10, and I12, FCC Form 1200; Line B7, FCC Form 1210.[4]

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[3] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, 8 FCC Rcd. 5631, 5789, ¶ 253 n.604 (1993) ("Report and Order").

[4] Similarly, the Commission's definition of "cost of franchise requirements" under its cable rate regulations, 47 C.F.R. § 76.925(b) (1993), and its discussion of that definition in its orders, see, e.g.,

[Footnote continued on next page]

It is critical that the Commission clarify the extent to which cable operators may treat "franchise related costs" as external costs in order to minimize disputes between a franchising authority or the Commission and a cable operator, and to prevent unwarranted surcharges on regulated rates. Otherwise, the result would be to render meaningless the Commission's attempt to control rate increases by its price cap regulations.

Cable operators can abuse the Commission's external cost treatment of franchise costs in a number of ways. For example, franchise agreements, which typically range from 10 to more than 100 pages, contain a number of provisions. Such agreements might contain general provisions that require, for example, a cable operator to construct, operate, and maintain a cable system "in a safe and reasonable manner"; and to provide cable service to any person requesting service in any area where it is "feasible" for the company to provide cable service. A cable operator might argue that any

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[Footnote continued from previous page]
In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, (MM Docket No. 92-266), FCC 93-428 at ¶¶ 101-02 (released August 27, 1993), do not provide sufficient guidance as to what costs are properly treated as "franchise related costs" under the Commission's external cost regulations.

increase in its costs for the general maintenance of its cable system is a "franchise related cost" because the franchise specifically requires it to maintain its system in a "safe and reasonable manner." Moreover, a cable operator may decide to extend its cable system to additional subscribers in a franchise area in order to expand its subscriber base and, thus, to maximize its profit in a franchise area. However, the operator may now argue that such line extension costs are "franchise related costs" because the franchise agreement requires it to provide service to subscribers in any area where it is "feasible" to provide cable service.

These are just a few of the many ways a cable operator might exploit the Commission's external cost rules and provisions in franchise agreements in an effort to pass through most increases in its costs as "franchise related" external costs. In the absence of clarification from the Commission, cable operators and franchising authorities or the Commission will engage in unnecessary disputes as to which of an operator's costs are "franchise related costs" entitled to external cost treatment.

In order to prevent such abuses and disputes, the Commission must adopt an easily administrable and realistic clarification of the term "franchise related cost" for purposes of calculating <u>increases</u> in external

costs. The Local Governments propose that the Commission clarify that "franchise related costs," for purposes of calculating increases in external costs: a) include only new or additional direct monetary costs specifically enumerated by a stated dollar amount in a franchise agreement to satisfy franchise requirements imposed by the franchising authority, or specifically attributable to a specific new or additional franchise requirement imposed by the franchising authority, but b) do not include: (i) normal types of business costs other companies incur in doing business with a jurisdiction; (ii) costs of keeping pace with current technological developments in the cable industry; or (iii) costs of remaining competitive in the marketplace. It is inconsistent with Congressional intent to permit the direct pass through of costs that a cable operator or any other business would have incurred to maintain a first-class, competitive business. In addition, to prevent a cable operator from overestimating increases in such costs in any quarter it files the FCC Form 1210, the Commission should require that a cable operator spread the costs for satisfying any new or increased "franchise related cost" requirements evenly throughout the franchise term.

II. The Commission Should Not Permit Cable Operators to Advertise Franchise Fees As a Charge Separate from Basic and Cable Programming Service Tier Rates

The Commission should reconsider its regulation regarding the advertising of rates by operators serving multiple franchise areas since it would permit a cable operator to advertise rates in violation of the intent of Section 622(c) of the Cable Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), 47 U.S.C. § 542(c), and the Commission's own subscriber bill itemization regulation. 47 C.F.R. § 76.985 (1993).

Section 76.946 of the Commission's cable rate regulations, which was adopted in the Third Order on Reconsideration, would permit a cable operator that provides service in multiple franchise areas to advertise a "fee plus" rate. 47 C.F.R. § 76.946 (to be codified). The Commission explained that, under this "fee plus" concept, "an advertisement might declare that basic service is $14.00 per month plus a franchise fee of 28¢ to 70¢, depending on location, or that it is $14.28 to $14.70, depending on location." Third Order on Reconsideration at ¶ 143 n.99.

To resolve the concerns of cable operators, the Local Governments do not question the appropriateness of a Commission regulation that would permit a cable

operator to advertise a range of rates (i.e., "$14.28 to $14.70, depending on location"). However, the Local Governments believe that it violates the intent of 47 U.S.C. § 542(c), and would be inconsistent with the Commission's own subscriber bill itemization regulation, to permit a cable operator to advertise a rate at "$14.00 per month plus a franchise fee of 28¢ to 70¢."

Section 622(c) of the 1992 Cable Act permits cable operators to identify as a separate line item on regular subscriber bills, "the amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid . . . ."[5] The legislative history for the 1992 Act clarifies that it was not the intent of Congress to allow operators to add franchise fees or other Section 622(c) charges to subscribers' bills in addition to regular charges for cable service. The House Committee Report stated that:

> The cable operator shall not identify cost [sic] itemized pursuant to [Section 622(c)] as separate costs over and beyond the amount the cable operator charges a subscriber for cable service. The Committee intends that such costs shall be

[5] Section 622(c) of the Cable Act also permits cable operators to so identify "(2) the amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support PEG channels or the use of such channels; and/or (3) the amount of any other fee, tax assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber."

> included as part of the total amount a cable operator charges a cable subscriber for cable service.

H.R. Rep. No. 628, 102d Cong., 2d Sess. 86 (1992) ("House Report") (emphasis added).[6] The House Report gives an example to illustrate this principle:

> For example, a cable operator might itemize pursuant to [section 622(c)] a $1.50 per month charge to account for a five percent franchise fee obligation. If a cable operator charges $30 per month for basic cable service, the $1.50 itemized charge shall be included in such amount; the cable operator cannot provide the cable subscriber a basic cable bill for $28.50, with a $1.50 additional charge added as a franchise fee. Thus, the bill would show a total charge of $30, but the cable operator would have the right to include in a legend a statement that the $30 basic cable service rate includes a five percent franchise fee, which amounts to $1.50.

Id. (emphasis added).

When the Commission adopted the regulation implementing the amendments to Section 622(c), it followed the reasoning described above.[7] The Commission considered whether Section 622(c) authorizes operators to identify costs itemized pursuant to the statute as separate costs over and beyond the amount identified as the charge for cable services. The Commission examined

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[6] As the Commission has noted, the House Report should be given weight in interpreting Section 622(c). See Report & Order, 8 FCC Rcd. at 5971, ¶ 550.

[7] See Report and Order, 8 FCC Rcd. at 5964-73, ¶¶ 542-52 (1993).

the House Report statements quoted above, and concluded that listing itemized costs "'below the line' would tend to confuse subscribers regarding what is or is not part of the bill." Report and Order, 8 FCC Rcd. at 5972, ¶ 551. Thus, the Commission ruled,

> any bill itemized pursuant to Section 622(c) may require only one payment for the operator's services on the part of a consumer, the total of which must include all fees and costs itemized pursuant to Section 622(c).

Id. (emphasis added).

The Commission's example of how cable operators may advertise franchise fees on a "fee plus" basis, Third Order on Reconsideration at ¶ 143, n.99, suggests that the Commission misunderstands the amount on which franchising authorities may assess franchise fees pursuant to Section 622(b) of the Cable Act, 47 U.S.C. § 542(b), which permits franchising authorities to collect up to five percent of a cable operator's gross revenues as franchise fees.

In breaking out franchise fees in the above example, the Commission suggests that the basic rate is only $14.00, as opposed to $14.28 to $14.70. In effect, the Commission is treating the franchise fee as a tax imposed on top of the basic rate. However, the franchise fee is not a tax. It is a cost to a cable operator for the use of local public rights-of-way to

provide cable service. The franchise fee, like any other cost to an operator, should be included in the basic cable rate and should be included in determining the cable operator's gross revenues.

If the Commission's example were correct, a franchising authority would not be collecting the full five percent franchise fee to which it is entitled under Section 622(b).[8] For example, by assuming that the basic rate is only $14.00 in its example, the Commission calculated the maximum franchise fee (5%) to be only 70¢. This calculation is clearly wrong and is inconsistent with the way franchise fees are calculated in many jurisdictions, including the City of New York. Instead, the basic rate should be $14.70, with a five percent franchise fee of 73.5¢. Under the Commission's example, the franchising authority would be getting less than five percent of gross revenues, and would lose 3.5¢ per subscriber per month on basic service in the above example. This loss would amount to a loss of tens of millions of dollars in franchise fees each year throughout the country.

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[8] Many franchise agreements, for example, calculate franchise fees based on the total gross revenues collected by subscribers, minus any credits or refunds. Under the Commission's example, franchise fees would not be included as part of gross revenues. Instead, they impermissibly would be treated as an offset against gross revenues.

Although Congress made clear in the 1992 Cable Act that cable operators may itemize franchise fees, it clearly did not intend that such itemization be done in a way that would deny franchising authorities the right to assess franchise fees on a cable operator's total gross revenues. In fact, the example from the 1992 Cable Act's legislative history discussed above makes clear that the five percent franchise fee should be imposed on the total charge for cable service to subscribers. See House Report at 86 ("If a cable operator charges $30 per month for basic cable service, the $1.50 itemized charge shall be included in such amount; the cable operator cannot provide the cable subscriber a basic cable bill for $28.50, with a $1.50 additional charge added as a franchise fee"). The five percent franchise fee ($1.50) is clearly assessed on the $30 total bill, rather than on the $28.50.

* * * *

With regard to franchise fees and other Section 622(c) charges, the Commission's decision to permit a cable operator to advertise a "fee plus" rate is plainly inconsistent with the principles underlying Section 622(c) of the Cable Act and the Commission's own subscriber bill itemization regulation. Moreover, the "fee plus" example the Commission provided suggests that franchising authorities would be entitled to less than

the five percent franchise fee permissible under Section 622(b) of the Cable Act.

To resolve the above concerns, Section 76.946 of the Commission's rate regulations should be amended to prohibit cable operators from advertising "fee plus" rates in cases where the "plus" rate is a franchise fee or other cost itemized pursuant to Section 622(c). The Commission could resolve the concerns of cable operators serving multiple jurisdictions with different franchise fees or other costs itemized pursuant to Section 622(c) simply by permitting such operators to advertise a range of rates (i.e., "$14.28 to $14.70, depending on location").

III. The Commission Should Not Treat Certain Costs As PEG Costs

The Commission should reconsider its conclusion that a cable operator may itemize as "PEG-related activities" pursuant to Section 622(c)(2), 47 U.S.C. § 542(c)(2), costs required under a franchise agreement for free wiring of public buildings, voice and data transmissions, and similar activities. Third Order on Reconsideration at ¶ 144. Contrary to the Commission's assertion, such activities are not related, or not necessarily related, to the provision of public, educational and governmental channels and, thus, may not be itemized under Section 622(c)(2) of the Cable Act.

Section 622(c)(2) only permits the itemization of costs "to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels." (emphasis added).

A requirement that a cable operator provide free basic cable service to a public building clearly is not related to the support or use of a PEG channel. For example, in franchise areas where a cable operator is not required to provide PEG channels, the provision of free basic service to public buildings clearly cannot be said "to support public, educational, or governmental channels or the use of such channels."

The Commission should reconsider its finding that certain costs may be itemized as PEG costs, and clarify that only costs that are directly related to the support or use of PEG channels, and are verifiable, may be included in itemized PEG costs. See House Report at 86 ("A cable operator shall include in such itemized costs only direct and verifiable costs"); Report and Order at 5968, ¶ 546.

IV. Franchising Authorities Should Determine the Method By Which Franchise Fees Are Refunded

The Commission should reconsider its franchise fee refund regulations to clarify that a franchising authority, rather than the cable operator, has the

discretion of determining whether to refund franchise fee overpayments or to deduct them against future franchise fee payments. The Commission's regulations do not clarify which entity determines the manner by which franchise fees are refunded. Section 76.942(f) states that the "franchising authority must promptly return the franchise fee overcharge either in an immediate lump sum payment, or the cable operator may deduct it from the cable system's future franchise fee payments." 47 C.F.R. § 76.942(f) (to be codified). See 47 C.F.R. § 76.961(e) (to be codified). However, the Third Order on Reconsideration suggests that the cable operator may have discretion in determining the method of payment: "With respect to money that constitutes a franchise fee overcharge . . ., and thus owed by a franchising authority to a cable operator, the cable operator may deduct the amount from future franchise fees, rather than have the franchising authority return it in one immediate lump sum payment." Third Order on Reconsideration at ¶ 106 n.63.

The Commission should clarify these rules for several reasons. First, the Commission should not establish a precedent that suggests that a private entity may order a governmental entity to take certain actions. Second, the Commission's franchise fee rules are inconsistent with the rules governing refunds by

cable operators to subscribers. See 47 C.F.R. §§ 76.942(d), 76.961(c) (1993). Sections 76.942(d) and 76.961(c) state that a cable operator "in its discretion" may implement a refund by returning overcharges or by means of a prospective percentage reduction in rates. Similarly, franchising authorities should have the discretion of determining whether to refund franchise fee overcharges or to offset such overcharges against future franchise fee payments.

CONCLUSION

For the reasons stated above, the Local Governments urge the Commission to reconsider or clarify certain of its cable rate regulations.

Respectfully Submitted,

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